filed by the lode claimant against an application for patent made in the land office by the placer claimants. The Federal District Court held that an action of this sort was purely possessory in its nature and that the question as to whether the deposit was a placer or lode, involved a determination of the character of the land which, according to the great weight of authority, at least, as between agricultural and mineral claimants, is a question exclusively within the jurisdiction of the Land Department in all cases where the matter is pending before the Department. The Court saw no valid reason for a different rule when the question arose between rival mineral claimants. The placer claimants prevailed because they had acquired possession of the ground first. The second decision noted [4] involved a deposit of a similar nature for which a lode claimant had filed its application for patent. The lands were thereafter withdrawn from entry under executive order in pursuance of the Act of Congress heretofore noted. The question arose as to whether a deposit of this nature should not properly have been located as a placer, in which event the lode application would be void and the land become subject to the withdrawal. The Land Department decided that the deposit was properly enterable as a lode, possessing as it did the characteristics of a lode deposit—being in place in the mass of the mountain and between well defined walls.

The third case [5] was decided by the Circuit Court of Appeals (8th circuit) and held substantially as did the Land Department, that these deposits are subject to location as lode claims and not as placer. The case also held, in direct conflict with the holding of the District Court in the other Duffield case above noted, that the Court had complete jurisdiction to determine this question even though it involved the character of the land and though the action was based on an adverse claim and consequently the matter was then pending in the land office and cited Webb v. American Asphaltum Co. [6] which presented a similar state of facts. The Court said, "We see no reason why when Congress required that the adverse claimant, to maintain his claim, must invoke the aid of a court of competent jurisdiction to determine the superior right as between the parties, it can be successfully said that the court, in making such inquiry is prohibited from determining whether the land is subject to location in the mode and manner claimed by one or both of the parties. . . What may be the binding force and effect of the judgment in this case, in that respect, upon the Land Department, we are not called upon to decide."

W. E. C.

Pleading—Amendment by Addition of New Party.—Lee v. McElroy, recently decided by the District Court of Appeal of California,[1] was an

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[4] 41 L. D. 403.
[5] 201 Fed. 830.
[6] 157 Fed. 203.
[1] 16 Cal. App. Dec. 442 (Decided March 5, 1913).

action for damages for personal injuries suffered by being struck by an automobile. By the deceit of the owner in giving the plaintiff the name of a third person as owner of the automobile, the plaintiff was induced to sue such third person. Upon discovering her mistake, after answer filed, the plaintiff moved to amend the complaint and summons by adding the real owner as a party defendant. The motion was denied. Upon appeal the order denying the motion was reversed and the case remanded. This action seems to be squarely opposed to the rule governing amendment which has been adopted by the California Supreme Court [2] and which has the support of the weight of authority in other states, [3] for while it was said that there was a cause of action against both parties, the complaint showed that although the original defendant had been nominally retained as a defendant no recovery could be had against him. The motion was made under a provision of the code, similar to that existing in many of the states, which provides: "The court may in furtherance of justice,—allow a party to amend any pleading or pleadings, by adding or striking out the name of any party." [4] While this language could hardly be broader, yet the courts in the cases above cited have held that it does not apply where the amendment wholly changes the original cause of action. But as almost any material amendment results in a new cause of action, [5] the application of the rule in this restricted form has necessarily resulted in many contradictions. Thus, it has been held that an amendment which changes an action at law to one in equity is permissible, [6] while one that changes an action ex contractu to one ex delicto is not permissible; [7] that an amendment in a tort action adding to the original parties a new party who also took part in the wrongful act is permissible, [8] while one enabling a person suing as administrator to recover in his individual capacity is not permissible. [9] The distinction has been made between the case where a "new or different" cause of action is added and the case where a "wholly different" cause of action is added, [5] but how a cause of action against A is any the less changed when it is amended to show a cause of action against A and B jointly than when it is amended to show a cause of action against B alone, is difficult to understand.

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[2] Ramirez v. Murray (1855), 5 Cal. 222; Dubbers v. Goux (1875), 51 Cal. 153; Hackett v. Bank of California, (1881) 57 Cal. 335; Sterrett v. Barker, (1897) 119 Cal. 492, 51 Pac. 695; cf. Merced Bank v. Price, (1908) 9 Cal. 177, 189.

[3] Glover v. Rollins, (1895) 87 Me. 434, 32 Atl. 999; State v. Rottaken, (1879) 34 Ark. 144; Hume v. Kelly, (1896) 28 Ore. 398, 43 Pac. 380; Doyle v. Carney, (1907) 190 N. Y. 386, 83 N. E. 37. But cf. Boyd v. U. S. Trust Co. (1907) 187 N. Y. 262; 116 Am. S. R. 599; 9 L. R. A. (N. S) 399

[4] Code of Civ. Proc. (Cal.) sec. 473.

[5] Frost v. Witter, (1901) 132 Cal. 421, 64 Pac. 705.

[6] Walsh v. McKeen, (1888) 75 Cal. 519, 17 Pac. 673.

[7] Ramirez v. Murray, supra; Hackett v. Bank of California, supra.

[8] Gittleman v. Feltman, (1908) 191 N. Y. 205, 83 N. E. 969.

[9] Doyle v. Carney, supra.

Clearly there is an entirely different cause of action introduced when B is joined to the original defendant.[10]

It seems to be the element of surprise to the defendant which forbids the amendment where the cause of action is "wholly" changed by it, for, in Ramirez v. Murray, supra, the court said that if the amendment were allowed, the defendant would find himself in court to answer a charge concerning which he had never been summoned. But to allow the amendment is a matter within the discretion of the trial court and injustice could always be avoided by granting a continuance, as is done in any other case of an amendment introducing a new element into the case whereby the defendant is surprised.[11] The solution of the difficulty will be found in giving full scope to the statutory provision by permitting any amendment to be made which is in furtherance of justice.[12]

B. B. B.

Practice—Service of Summons on Corporation Whose Officers Have Departed from the State—The Supreme Court of California in the case of McKendrick v. Western Zinc Mining Company and Tehama Mining Company[1] has held that in an action against a domestic corporation, "all of whose agents and officers upon whom service can be made,—its actual body in point of fact, for this purpose—have departed from the state,—the corporation itself, though still a legal resident of the state and constructively present therein, has departed from the state, within the purview of section 412 of the Code of Civil Procedure."

Such a doctrine is, we believe, unsupported by authority. It has always been considered that though the directors of a corporation are more than mere agents,[2] the officers stand in a position little, if any, different from that of other agents and are in no sense the body of the corporation.[3] It had seemed equally well established that inasmuch as a corporation cannot exist except under the authority of the laws of the particular jurisdiction creating it,[4] it cannot possibly depart from the state where alone those laws have effect and operation.[5]

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[10] Roberts v. Atlanta Real Estate Co., (1903) 118 Ga. 502, 45 S. E. 308.

[11] Polk v. Coffin, (1858) 9 Cal. 56; Lewis v. Lanphere, (1875) 79 Ill., 187; Litchfield Coal Co v. Taylor, (1876) 81 Ill., 590; Miszner v. Siter, (1859) 23 Tex. 621; Peterson v. Metropolitan Street Ry. Co., (1908) 211 Mo. 498; 111 S. W. 37.

[12] Hilton v. Osgood, (1881) 49 Conn. 110; Clover etc. Milling Co. v. Abilene Milling Co, (1909) 136 Mo. App. 365, 116 S. W. 1112; Merriman v. City of Springfield, (1910) 142 Mo. App. 506, 127 S. W. 122; Litchfield Coal Co. v. Taylor, supra.

[1] (Supreme Court, California, Feb. 27, 1913) 45 Cal. Dec. 302.

[2] Maynard v. Fireman's Fund Insurance Co, (1867) 34 Cal. 48.

[3] Blen v. Bear River etc. Co., (1862) 20 Cal. 602, 81 Am. Dec. 132; Bank of Healdsburg v. Bailhache, (1884) 65 Cal. 327, 332, 4 Pac. 106; California Winemakers' Corporation v. Sciaroni, (1903) 139 Cal. 277, 72 Pac. 990; Lowe v. Yolo County etc. Water Co., (1910) 157 Cal. 503, 512, 108 Pac. 297.

[4] Moran v. Ross, (1889) 79 Cal. 159, 21 Pac. 547.

[5] American etc. Wireless Co v. Superior Court, (1908) 153 Cal. 533,